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# QUESTIONING THE UN'S IMMUNITY IN THE DUTCH COURTS: UNRESOLVED ISSUES IN THE MOTHERS OF SREBRENICA LITIGATION

BENJAMIN E. BROCKMAN-HAWE\*

## I. INTRODUCTION

Providing victims with a judicial forum where they can air their grievances and obtain redress for violations of their rights is regarded as the cornerstone of an international culture of accountability. Restrictions on the right of access to a court must not run afoul of international law's prohibition on the denial of justice.<sup>1</sup> The operation of international organizations, on the other hand, is predicated on the notion that shielding such organizations from the normal processes of foreign law, by providing for their immunity before foreign national courts, is the only way to ensure their effectiveness.<sup>2</sup> When an international organization tasked with promoting human rights is itself accused of human rights violations, these two international norms run afoul of one another, and any resulting incompatibility must be resolved.

The tension between the immunity and the accountability of international organizations was recently dealt with by the Dutch Court of Appeals in the case of *Mothers of Srebrenica v. the Netherlands & the*

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1. See *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) ¶ 34 (1975) (“[I]n civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.”). The right of access to a court is enshrined in many important human rights texts. See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 24, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); International Covenant on Civil and Political Rights, art. 14 (1), G.A. Res. 2200A, U.N. Doc. A/RES/2200A (Mar. 23, 1976) [hereinafter ICCPR]; European Convention on Human Rights and Fundamental Freedoms, art. 6 (1), opened for signature Apr. 11, 1950, E.T.S. No. 5 (entered into force Mar. 9, 1953), amended by C.E.T.S. No. 194 (June 1, 2010) [hereinafter ECHR]; Universal Declaration of Human Rights, art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

2. Eric Robert, *The Jurisdictional Immunities of International Organisations: The Balance Between the Protection of the Organisations' Interests and Individuals Rights*, in DROIT DU POUVOIR, POUVOIR DU DROIT: MÉLANGES OFFERTS À JEAN SALMON 1433, 1436–38 (Bruylant ed., 2007).

*United Nations*.<sup>3</sup> This case was not the first before Dutch courts in which plaintiffs have sought to hold the Netherlands responsible for the failure of Dutch troops operating under a UN mandate to prevent the 1995 attacks against Bosnian Muslims at Srebrenica,<sup>4</sup> but it is the first suit to claim the UN was jointly and severally liable. This Article examines the judgment of the Dutch Court of Appeals, which affirmed the decision of the lower court to dismiss the suit against the UN for lack of jurisdiction.

## II. BACKGROUND

The *Mothers of Srebrenica* case stems from the notorious July 1995 attacks against Bosnian Muslims perpetrated by Bosnian Serb forces in the East Bosnian enclave of Srebrenica.<sup>5</sup> Various courts, including the International Court of Justice (“ICJ”),<sup>6</sup> the Court of Bosnia and Herzegovina,<sup>7</sup> and the International Criminal Tribunal for the former Yugoslavia (“ICTY”)<sup>8</sup> have examined the attacks and confirmed that they amounted to genocide. The events leading up to the atrocities of July 1995

3. Hof’s-Gravenhage [Court of Appeals] 30 mart 2010 (Ass’n of Mothers of Srebrenica/the Netherlands & the United Nations) (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

4. See, e.g., Rb.’s-Gravenhage [District Court] 10 sept. 2008, NJF 2011, (H.N./Netherlands) (dismissing claims against the Netherlands as there was no evidence that the Dutch government “cut across the United Nations command structure” by ordering Dutch troops to ignore or disobey UN orders). The decision was reversed on appeal on the grounds that the Dutch forces were placed in the “extraordinary” position of being under the “effective control” of the Dutch Government after Srebrenica fell, inasmuch as the Dutch Government retained the “power to prevent” the conduct at issue. Hof’s-Gravenhage [Court of Appeals] 30 mart 2010 (Ass’n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶ 5.11 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version). A separate complaint was also lodged against three members of the Dutch troop contingent assigned to protect civilians at Srebrenica in their individual capacities. Hillary Stemple, *Srebrenica Victims File Complaint Against Dutch Peacekeepers*, JURIST (July 7, 2010, 2:33 PM), <http://jurist.org/paperchase/2010/07/srebrenica-victims-file-complaint-against-dutch-peacekeepers.php>.

5. See *Timeline: Siege of Srebrenica*, BBC NEWS, <http://news.bbc.co.uk/2/hi/675945.stm> (last updated June 9, 2005) (providing a timeline of the events leading up to the Srebrenica massacre from July 6 through July 17, 1995).

6. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91 (Feb. 26).

7. See, e.g., Prosecutor v. Milorad Trbić, Court of Bosnia and Herzegovina, Oct. 16, 2009, No. X-KR-07/386 (Court of Bosn. & Herz.); Prosecutor v. Milos Stupar, Court of Bosnia and Herzegovina July 29, 2008, No. X-KR-05/24 (Bosn. & Herz.).

8. See, e.g., Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004.).

were recently summarized by Trial Chamber II of the ICTY in the case of *Prosecutor v. Popovic*:

In early July, these two United Nations protected areas [Srebrenica and Žepa], established as havens for civilians caught up in the calamity of war, were the subject of intense military assault by Bosnian Serb Forces. The United Nations protection forces in both places were disabled and rendered powerless. In Srebrenica, the terrified Bosnian Muslim population fled to the nearby town of Potočari. There, in the face of a catastrophic humanitarian situation, the women, children and the elderly were ultimately loaded onto packed buses and transported away from their homes in Eastern Bosnia. For a large proportion of the male population, who were separated, captured or had surrendered, a cataclysmic fate awaited them. Thousands of them were detained in horrific conditions and subsequently summarily executed.<sup>9</sup>

In 1996, the Dutch government asked the Netherlands Institute for War Documentation (“Institute”) to explain the failure of the United Nations Protection Force (“UNPROFOR”), specifically its 400-strong Dutch troop component (“Dutchbat”), to effectively deter the Srebrenica attacks.<sup>10</sup> In 2002, the Institute published its findings (“Report”), which blamed the Dutch Government and senior military officials for handing over Bosnian Muslim civilians to Serb forces.<sup>11</sup> The Report also blamed the United Nations for failing to provide proper support to Dutchbat.<sup>12</sup> With respect to

9. *Prosecutor v. Popovic*, Case No. IT-05-88-T, Judgment, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010). The Trial Chamber confirmed that it was “satisfied beyond reasonable doubt that at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica” and noted that “the evidence before it is not all encompassing. . . . The Trial Chamber therefore considers that the number could well be as high as 7,826.” *Id.* ¶ 664. For a more comprehensive account of the circumstances surrounding the establishment of UNPROFOR and the withdrawal of Dutch troops from Srebrenica, see U.N. Secretary-General, *The Fall of Srebrenica: Rep. of the Secretary-General Pursuant to General Assembly Resolution 53/35*, U.N. Doc. A/54/549 (Nov. 15, 1999) [hereinafter U.N. Report, *The Fall of Srebrenica*], available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/4e8fe0c73ec7e4cc80256839003eeb04?Opendocument>.

10. See, e.g., *NIOD Report on Srebrenica*, ARIUSILA (July 12, 2011), <http://ariusila.cafebabel.com/en/post/2011/12/07/NIOD-Report-on-Srebrenica>.

11. NETHERLANDS INSTITUTE FOR WAR DOCUMENTATION [NIOD], *SREBRENICA: A ‘SAFE’ AREA, PART II, DUTCHBAT IN THE ENCLAVE* (2002), available at <http://ariusila.cafebabel.com/en/post/2011/12/07/NIOD-Report-on-Srebrenica>. The “6,000-page account” has been criticized by various scholars, including those who worked on it, for the fact that its length allows individuals to “draw different conclusions from different parts of the book.” See Karen Meirik, *Controversial Srebrenica Report Back on Table*, IWPR (Nov. 9, 2005), <http://www.iwpr.net/report-news/controversial-srebrenica-report-back-table>.

12. NIOD, *supra* note 11, at 15–16.

the command relationship between the United Nations and the Dutch battalion, the Report concluded that Dutchbat was under the “operational control” of the United Nations but had acted independently in its administration of the Srebrenica Safe Zone.<sup>13</sup>

The events of July 1995 had a profound impact on the Dutch government and the United Nations. The publication of a report critical of the role the Dutch government played in Srebrenica resulted in the resignation of the entire Dutch Cabinet in 2002, and the question of whether the Netherlands should apologize for its role in the killings remains controversial.<sup>14</sup> Srebrenica also became a permanent stain on the reputation of UN. In 1999, the UN Secretary-General, Kofi Annan, acknowledged “[t]he tragedy of Srebrenica will haunt our history forever.”<sup>15</sup> His successor, Ban Ki-Moon, echoed his predecessor’s sentiment at a 2010 memorial ceremony for the Srebrenica victims, admitting that “[t]he United Nations made serious errors of judgment in Srebrenica, which weigh heavy on our collective memory and conscience.”<sup>16</sup>

On June 4, 2007, the Mothers of Srebrenica Association, a Bosnian non-governmental organization (“NGO”), and ten individual plaintiffs commenced a civil action against the Dutch government of the Netherlands and the United Nations in the District Court of The Hague.<sup>17</sup> The plaintiffs sought compensation from both the Netherlands and the

13. *Id.* at 15.

14. *Dutch Government Quits Over Srebrenica*, BBC NEWS (Apr. 16, 2002, 15:54 GMT), <http://news.bbc.co.uk/2/hi/europe/1933144.stm>; On 11 July 2010 the Dutch Minister of Defense refused to apologize for the Srebrenica massacre, stating that if anyone should apologize, it should “be the United Nations as the international community failed in the events surrounding the fall of Srebrenica.” Former Dutch Minister Jan Pronk, however, continues to pressure the government to accept responsibility. *Excuses Srebrenica meer zaak van VN*, de Volkskrant (11 July 2010), <http://www.volkskrant.nl/vk/nl/2668/Buitenland/detail/1009328/2010/07/11/Excuses-Srebrenica-meer-zaak-van-VN.dhtml>. *Jan Pronk: ‘Verantwoordelijkheid Srebrenica nog steeds ontkend’*, de Volkskrant (11 July 2010), <http://www.volkskrant.nl/vk/nl/2668/Buitenland/article/detail/1009416/2010/07/22/Jan-Pronk-Is-quo-Verantwoordelijkheid-Srebrenica-nog-stee-ontkend.dhtml>.

15. U.N. Report, *The Fall of Srebrenica*, *supra* note 9, ¶ 503. The failure of UN forces to protect civilians at Srebrenica and in Rwanda provided the impetus for the UN to substantially reform its peacekeeping practices. U.N. Secretary-General, Letter dated Aug. 21, 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000) [hereinafter U.N. Brahimi Report].

16. U.N. Secretary-General, Remarks at Commemoration of Srebrenica Massacre, Stresses Need For All, Including United Nations, to Learn From Past Errors, U.N. DEP’T OF PUBLIC INFORMATION SG/SM/13008 (July 12, 2010), available at <http://www.un.org/News/Press/docs/2010/sgsm13008.doc.htm>.

17. *Rb.’s-Gravenhage* [District Court] 10 July 2008, (Ass’n of Citizens Mothers of Srebrenica/the Netherlands), ¶ 1 (Neth.), available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u\\_ljn=BD6796](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u_ljn=BD6796) (translating the case in an unofficial English version).

United Nations as co-defendants.<sup>18</sup> Additionally, the plaintiffs sought to compel both co-defendants to accept moral responsibility for the events at Srebrenica.<sup>19</sup> On July 10, 2008 the district court determined that it was not competent to hear the action brought against the United Nations on account of its immunity from suit before national courts.<sup>20</sup> The Court of Appeals upheld the verdict of the District Court, in the process considering whether: (a) the state could assert the immunity of the UN, (b) the immunity enjoyed by the UN was absolute or limited in scope, and (c) a conflict regarding the right of access to a court justified setting aside the UN's immunity.<sup>21</sup> This Article discusses these three aspects of the Court of Appeals decision, referencing the District Court decision where necessary to illustrate important points of convergence or departure.

### III. THE IMMUNITY OF THE UN

#### A. Asserting the UN's Immunity Before Dutch Courts

The UN routinely declines to appear before national courts, instead invoking its immunity through letters sent to the Permanent Representative of the host state of the national court where jurisdiction is sought.<sup>22</sup> The *Mothers of Srebrenica* case proved to be no exception, and it was left to the Netherlands to assert the immunity of its co-defendant before the Dutch courts.<sup>23</sup> Because the plaintiffs raised objections relating to the capacity of the Netherlands to petition on behalf of its co-defendant,<sup>24</sup> the Dutch courts were faced with the procedural question of whether the Netherlands had an "interest in the outcome of the proceedings" sufficient to justify its appearance on behalf of the UN before the Dutch courts.<sup>25</sup>

18. *Id.* ¶ 2.1

19. *Id.*

20. *Id.* ¶ 6.1.

21. Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Ass'n of Mothers of Srebrenica/the Netherlands & the United Nations) (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

22. See Anthony Miller, *The Privileges and Immunities of the United Nations*, 6 INT'L ORG. L. REV. 7, 41 (2009).

23. Rb.'s-Gravenhage [District Court] 10 july 2008 (Ass'n of Citizens of Mothers of Srebrenica/the Netherlands), § 5.13 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

24. Hof's-Gravenhage [Court of Appeals] Mothers of Srebrenica, ¶ 2.2; Rb.'s-Gravenhage [District Court], Mothers of Srebrenica, ¶ 3.4.

25. Hof's-Gravenhage [Court of Appeals], Mothers of Srebrenica, ¶ 2.5; Rb.'s-Gravenhage [District Court], Mothers of Srebrenica, ¶ 5.6.

Consistent with the District Court decision,<sup>26</sup> the Court of Appeals held that the State had

a reasonable interest in a Netherlands court not delivering any judgments which conflict with the immunity granted to the UN . . . , because in that case the State, to whom such ruling should be imputed under international law, would violate its obligations arising from [Article 105 of the Charter and Article II § 2 of the Convention.]<sup>27</sup>

Thus, both courts held the Netherlands' assertion of immunity for the UN was procedurally proper.

Domestic courts are placed in a tough position when national governments assume conflicting international responsibilities. While principles of justice forbid judges from abstaining on the grounds that the legislative branches have not made it clear which obligations they have prioritized, separation-of-powers principles prohibit courts from taking a position on matters affecting the foreign relations of the state.<sup>28</sup> These problems are exacerbated when one of the international obligations in question is to secure the fundamental rights of a petitioner. Keeping in mind that in *Mothers of Srebrenica* the Dutch courts potentially faced the difficult choice of either forcing the Netherlands to violate its UN Charter responsibilities or setting the stage for a claim before the European Convention on Human Rights and Fundamental Freedoms ("ECHR") that the Netherlands violated its international law obligation to provide access to a court, it is not a surprise that both the District Court and the Court of Appeals permitted the Netherlands to intervene and explain its legal and political priorities. Importantly, these Dutch court decisions allowed the Netherlands to discharge its duty under the majority decision by the ICJ in *Cumaraswamy* "to inform its courts of the position taken by the Secretary-General" concerning the UN's immunity and ensure that the courts consider the issue of immunity as a threshold matter *in limine litis*.<sup>29</sup> There

26. Rb.'s-Gravenhage [District Court], *Mothers of Srebrenica*, ¶ 5.6.

27. Hof's-Gravenhage [Court of Appeals], *Mothers of Srebrenica*, ¶ 2.5.

28. Alexandra Weerts, *Les Immunités des Organisations Internationales Face à L'article 6 de la Convention Européenne des Droits de L'homme*, 134 J. DU DROIT INT'L 3, 24 (2007).

29. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62, ¶¶ 62–63 (Apr. 29) [hereinafter *Cumaraswamy*]. The ICJ's opinion is ambiguous as to whether the duty of state authorities to bring an affirmative finding of immunity by the Secretary-General of the UN to the attention of a national court is triggered by the Secretary-General's explicit request that such measures are taken, or whether state authorities are under an independent obligation to do so before their national courts on their own motion. *Id.* ¶¶ 60–61. The latter interpretation was favored by Judge Oda. *Id.* ¶ 21 (Oda, concurring).

is no indication, however, that the Dutch courts specifically considered *Cumaraswamy*.

### B. *The Scope of the Immunity of the UN*

The UN's procedural immunity from suit before national courts is provided for, in general terms, by Article 105(1) of the UN Charter, which states that "[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."<sup>30</sup> The Privileges and Immunities Convention further defines these immunities in Article II, Section 2, which states that "[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."<sup>31</sup> The apparent functionally-limited grant of immunity provided for in the UN Charter has historically been regarded as embodying a standard of absolute immunity, insofar as "international organizations can only act within the scope of their functional personality [and] there is no room left for non-functional acts for which immunity would be denied."<sup>32</sup> In recent years, however, the scholarly community has come to regard the functional approach as overbroad, and now generally encourages courts to adopt a "strict-functionality" test that would limit the

Judge Koroma, however, denied that Malaysia was responsible for implementing its Convention obligations in the specific manner suggested by the majority at all and would seem therefore to favor the latter interpretation. *Id.* ¶ 28 (Koroma, dissenting); see also Guido den Dekker & Jessica Schechinger, *The Immunity of the United Nations Before the Dutch Courts Revisited*, THE HAGUE JUSTICE PORTAL 2 (June 4, 2010), <http://www.haguejusticeportal.net/eCache/DEF/11/748.html> ("[T]he State would be responsible for violations of international law if national courts would deny immunity contrary to the UN Charter, Article 105, and the Convention on the Privileges and Immunities of the United Nations, Article II(2), . . . . This finding of legitimate involvement of the State in the proceedings is in line with an opinion of the [ICJ] stating that every Member State has an obligation pursuant to Article 105 of the UN Charter to see to it that its national courts deal with the question of UN immunity as a preliminary matter.").

30. U.N. Charter art. 105, para. 1, available at <http://www.un.org/aboutun/charter/>. The UN Charter was signed on June 26, 1945 and entered into force on Oct. 24, 1945.

31. Convention on Privileges and Immunities of the United Nations, art. 2(2), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, 16, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201/volume-1-I-4-English.pdf>. The Netherlands has been a party to this treaty since April of 1948. *Id.*

32. August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 INT'L ORG. L. REV. 59, 63 (2004). Reinisch also noted that "the idea of functional immunity is rather imprecise insofar as it could refer both to the rationale of granting immunity at all . . . as well as to a certain content of immunity to be accorded." AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 331 (2000) [hereinafter NATIONAL COURTS]. Furthermore, "many scholars and judges consider . . . 'functional' and 'absolute' [to be] synonymous qualifications." *Id.* at 332–33; see also *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008) (holding that the UN is absolutely immunized from suit before U.S. courts).



application of the UN's immunity to activities that are necessary for the exercise of its functions or fulfillment of its purposes.<sup>33</sup>

The *Mothers of Srebrenica* argued that the UN could only possess a strict-functional immunity, on the basis that “the Convention cannot extend further than the superior ranked U.N. Charter.”<sup>34</sup> The question of the scope of the immunity granted to the UN would prove to be a point of departure between the Dutch Court of Appeals and District Court. The District Court seemed to favor the approach suggested by the plaintiffs.<sup>35</sup> Although it ostensibly denied that the UN Immunities Convention and UN Charter “offer[ed] grounds for restricting the immunity,”<sup>36</sup> the District Court ended up dismissing the case on the grounds that the impugned acts were within the functional scope of the UN's authority.<sup>37</sup> The Court of Appeals was less receptive to the strict-functional approach and decided that Article II section 2 of the UN Convention and Article 105(3) of the UN Charter granted the UN “the most far-reaching immunity, in the sense that the UN cannot be brought before any national court of law in the countries that are a party to the Convention.”<sup>38</sup>

33. See, e.g., NATIONAL COURTS, *supra* note 32, at 339–41; Jordan Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT'L L.J. (2010); PETER H. F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS 39 (1994); Emmanuel Gaillard and Isabelle Pingel-Lenuzza, *International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass*, 51 INT'L & COMP. L.Q. 1, 5 (2002); PIERRE KLEIN, LA RESPONSABILITÉ DES ORGANISATIONS INTERNATIONALES DANS LES ORDRES JURIDIQUES INTERNES ET EN DROIT DES GENS 230 (1998); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 351 (3d rev. ed. 1995).

34. M.R. GERRITSEN ET AL., VAN DIEPEN VAN DER KROEF ADVOCATEN, STATEMENT OF APPEAL, ¶ 80 (Apr. 7, 2009) [hereinafter STATEMENT OF APPEAL], available at <http://www.vandiepen.com> (providing statement on behalf of Mothers of Srebrenica).

35. Rb.'s-Gravenhage [District Court] 10 July 2008 (Ass'n of Citizens Mothers of Srebrenica/the Netherlands), ¶¶ 3.4(5), 5.11 (Neth.), available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u\\_ljn=BD6796](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u_ljn=BD6796) (translating the case in an unofficial English version). *Contra* Otto Spijkers, *The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court*, 13 J. OF INT'L PEACEKEEPING 197, 206 (2009); Dekker & Schechinger, *supra* note 29, at 4; Miller, *supra* note 22, at 40.

36. Rb.'s-Gravenhage [District Court], Mothers of Srebrenica, ¶ 5.16. The District Court also asserted in dicta that “in international law practice the absolute immunity of the U.N. is the norm and is respected.” *Id.* ¶ 5.13.

37. *Id.* ¶ 5.12 (“It is particularly for acts within this framework that immunity from legal process is intended.”). Additionally, the District Court suggested that national courts could review the acts of the UN for compatibility with Article 105 with “the greatest caution and restraint,” and “if and insofar as it has scope for testing, [it] proceed[s] . . . with the utmost reticence.” *Id.* ¶¶ 5.14, 5.15.

38. Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Ass'n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶ 4.2 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

The Dutch Court of Appeals is one of only a handful of judicial institutions to have evaluated the scope of the UN's immunity on the basis of the international law obligations embodied in the UN Convention and Charter, as opposed to domestic laws that have incorporated those international law obligations.<sup>39</sup> Interestingly, the Dutch Court of Appeals decision deviated from the precedent set by the Belgian Civil Tribunal in a decision from several decades earlier. In *Manderlier*, the Belgian Tribunal concluded that the UN Charter embodied only the immunities that “necessity strictly demands for the fulfillment of the [UN’s] purposes,” but that these immunities had been expanded by Section II of the Convention.<sup>40</sup> The Dutch Court of Appeals turned this analysis on its head, concluding that the UN Convention had not gone “beyond the scope allowed by Article 105 of the Charter.”<sup>41</sup> The Dutch court went on to explain that

the question that needs to be addressed is not whether the invocation of immunity in this particular case . . . is necessary for the realization of the objectives of the UN, but whether it is necessary for the realization of those objectives that the UN is granted immunity from prosecution *in general*.<sup>42</sup>

Answering in the affirmative, the court noted the risk that the UN—the sole international body authorized to exercise “far-reaching powers” in the maintenance or restoration of peace and security—would be prevented from fulfilling its purpose by opportunistic or frivolous litigation if it were afforded anything less than absolute immunity.<sup>43</sup>

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39. Most national courts assess the scope of immunity granted to an international organization on the basis of domestic legislation providing for such immunity. *See Entico Corp. v. UNESCO*, 2008 U.N. Jurid. Y.B. 477, 481–85, paras. 20–26 (assessing the immunity of UNESCO in light of the International Organizations Act of 1968); *De Luca v. United Nations Organization*, 841 F. Supp. 531, 533 (S.D.N.Y. 1994) (considering the immunity of the United Nations in light of the U.S. International Organizations Immunities Act (“IOIA”)) (citations omitted). The IOIA provides that international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.” International Organizations Immunities Act, 22 U.S.C. § 288a(b) (2006).

40. *Manderlier v. Organisation des Nations Unies et l’État Belge*, Brussels Civil Tribunal, 11 May 1966, 45 I.L.R. 446, 453 (Belg.); Court of Appeals of Brussels, 15 Sept. 1969, 69 I.L.R. 139 (Belg.). For more on the *Manderlier* case, read Jean Salmon, *De Quelques Problèmes Posés aux Tribunaux Belges par les Actions de Citoyens Belges contre l’O.N.U. en Raison de Faits Survenus sur le Territoire de la République Démocratique du Congo*, 81 JT 713, 714 (1966).

41. Hof’s-Gravenhage [Court of Appeals], 30 mart 2010, *Mothers of Srebrenica*, ¶ 4.4.

42. *Id.* ¶ 4.5 (emphasis added).

43. *Id.* ¶ 5.7.

Although the “in-general” test suggested by the Dutch Court of Appeals has found support amongst academics<sup>44</sup> and is consistent with the decisions of other national courts that have accepted the UN’s virtually absolute immunity,<sup>45</sup> the suggestion that a national court cannot decide whether immunity is “necessary” for the functioning of the international organization in light of the specific circumstances of a particular case is problematic for legal and policy reasons. First, the decision ignores the reality, acknowledged by various branches of the UN itself, that the UN’s immunity is *not* unlimited and it does not cover all situations where its application would be convenient. The UN Office of Legal Affairs (“OLA”) has concluded time and again that the immunity granted in the UN Convention and Charter does not extend to its participation in commercial enterprises or in competitive bidding process.<sup>46</sup> This acknowledgement comports with the UN General Assembly’s understanding that immunities have an “outer limit” beyond which “no

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44. Dekker & Schechinger, *supra* note 29, at 3 (“[I]f a national court could decide whether immunity was ‘necessary’ for the functioning of the international organization in a given case, the essence of functional immunity would be lost for all practical purposes.”).

45. *See, e.g.*, Manderlier, 45 I.L.R. at 453; 69 I.L.R. at 139.

46. *Advisability of the United Nations Entering Into a Profit-Making Joint Venture with a Private Publishing Firm—Purpose of the Current Commercially Oriented Activities of the United Nations—Participation in a Profit-Oriented Commercial Joint Venture Could Put the Status and Character of the Organization in Question*, 1990 U.N. Jurid. Y.B. 257, available at <http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByVolume/1990/chpVI.pdf>. The UN Office of Legal Affairs (“OLA”) acknowledged that if “the Organization were to participate in a commercial joint venture, it would . . . have to waive its privileges and immunities, the granting of which would no longer be justified.” *Id.*; *see also* Miller, *supra* note 22, at 21–22 n.45 (describing other incidents in which the OLA of the UN has recommended against undertaking a particular activity on the grounds that it would exceed the functional mandate of the UN and expose it to liability); Frederik Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT’L L. 103, 123 (2002) (“[A]pplication of the Convention has been inconsistent and UN rhetoric has been confused. At various times, both the broad and narrow interpretations of immunity protections have been invoked, with [UN] officials sometimes calling for a waiver and other times defining certain activities outside the scope of immunity.”). This position was also taken by the High Court of Kenya. *Tanad Transporters Ltd., Applicant, v. United Nations Children’s Fund*, Ruling of 1 July 2009, 2009 U.N. Jurid. Y.B. 487, 488, available at <http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByVolume/2009/chpVIII.pdf> (“[F]or the applicant to succeed in its claim that this court has jurisdiction to hear the dispute, it must establish that the commercial activity exercised by the respondent is outside its official function. In the present application, it is clear that the transportation agreement between the applicant and the respondent related to the official function of the respondent.”); *see also Participation of Organizations of the United Nations System in Competitive Bidding Exercises Conducted by Governments*, 1999 U.N. Jurid. Y.B. 418, 423, available at <http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByVolume/1999/chpVII.pdf> (“If the practice of United Nations system organizations competing with private companies for business were to be pursued, it cannot be a priori excluded that the immunity of such organizations might be challenged in court. Whether this would occur and the possible results are difficult to predict. Even if the United Nations system organizations were to prevail in such legal actions, the institution of such actions conceivably could have other implications.”).

privileges and immunities which are not really necessary should be asked for,"<sup>47</sup> as well as the understanding of the ICJ, which has explicitly found that the UN's purposes "are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited."<sup>48</sup> If the UN's immunity is not absolute, there is nothing to prevent national courts from exploring the limits of that immunity.

Second, it is troubling that the "in-general" test shifts the focus of the inquiry away from the scope of the UN's immunity, as provided for in its foundational documents, and towards the effects of allowing a suit to proceed against the accused organizations. The dangers of this approach may be seen in the following example. Imagine a situation in which two identical claims are brought against an organization with a limited mandate but afforded broad immunity. In one of these cases, the plaintiffs seek substantial damages, which, if awarded, would bankrupt an international organization. In the second case, a much more modest amount is sought. By the logic of the Dutch Court of Appeals, the first case should be dismissed, for the sole reason that, if pursued, the claims may lead to an impairment of organization's ability to function, whereas the second claim should be allowed to proceed on the basis of its limited impact. While it is unlikely that a national court would actually decide a case on this basis, this example does indicate the capriciousness of the effects-focused "in-general" test.

Finally, the "in-general" test takes as a given that providing for the absolute immunity of the UN is the only way to insulate it from malicious or frivolous litigation and provide for its effective functioning. This notion does not, however, correspond with today's realities. Considering the position of international organizations in the contemporary world, one academic concluded:

The argument that international organizations need expansive immunities to achieve their organizational purposes overlooks the current size, stature, and influence of many of these institutions. Expansive jurisdictional immunity arguably may have been a functional requirement a half century ago when these international organizations were fledgling, under-resourced, and politically precarious. But this is hardly the case today. The most prominent international organizations are now well-funded and firmly

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47. G.A. Res. 1/22A(1), § D, U.N. Doc. A/RES/1/22A(1) (Feb. 13, 1946).

48. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151 (July 20) (discussing the article 17, paragraph 2 of the UN Charter).

established in the international system, and have considerable legal and political resources at their disposal to defend their independence and organizational prerogatives. In fact, the power and influence of the more prominent organizations have expanded to the point where they are largely insulated from overreaching by most of their member states.<sup>49</sup>

Although, in all probability, the UN's impugned acts and decisions during the 1995 attacks did fall within the scope of its functional immunity, it is nevertheless unfortunate that the Dutch Court of Appeals chose the path of least resistance and immunized the UN from suit in a manner that far exceeds its legitimate functional needs and contravenes the demands of international law and public policy. In light of the shortcomings discussed above, other courts adjudicating claims against international organizations should be wary of following the rationale in the precedent set by the Dutch Court of Appeals in *Mothers of Srebrenica*.

### C. *Providing Access to a Court: Immunity and the Jurisdiction of the Dutch Courts*

In the final section of its judgment, the Dutch Court of Appeals addressed the appellant's arguments that the immunity of the UN should be set aside by the Dutch courts on the basis of their right of access to a court, as embodied in Article 6 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"). According to the court, the duty of the Netherlands to provide access to a court was not displaced by Article 103 of the UN Charter, which provides that in the event of a conflict between the Charter obligations of UN members and their obligations under another international agreement, their Charter obligations prevail.<sup>50</sup> According to the court:

The development of international law since 1945, the year the Charter was signed, has not stopped and shows an increasing attention for and recognition of fundamental rights, that cannot be ignored by the Court of Appeals. Moreover, as is clear from the preamble to the Charter and Article 1 Subsection 3 of the Charter,

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49. Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 522 (2008).

50. Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Ass'n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶ 5 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

the UN explicitly has as its purpose the promotion and encouragement of respect for human rights and for fundamental freedoms. It is implausible that Article 103 of the Charter intends to impair the enforcement of such fundamental rights.<sup>51</sup>

While it is true that Article 103 was not drafted for the purpose of freezing human rights at 1945 levels, it was intended to preempt the displacement of the terms of the UN Charter by subsequent treaties, even human rights treaties, which would seem to be precisely the situation faced by the Dutch Court of Appeals in *Mothers of Srebrenica*. The failure to address this issue head-on erodes confidence in the soundness of the court's opinion.

Moreover, the decision to test Article 103 against the right of access embodied in Article 6 of the ECHR and Article 14 of the ICCPR, as opposed to the right as a matter of customary law capable of being invoked independently of the treaty provision, as the Dutch Court of Appeals had acknowledged earlier in its opinion,<sup>52</sup> is unfortunate for three reasons. First, had the court fully committed to the "customary law" line of reasoning, it could have sidestepped the Article 103 issue entirely, as the UN Charter asserts no primacy over international custom.<sup>53</sup> Second, testing the Charter against the ECHR and ICCPR predisposed the Dutch Court of Appeals towards considering the limits on the right of access that have been inferred by the bodies responsible to interpreting those treaties.<sup>54</sup> Had the court considered the right of access as it appears as a matter of customary international law, it may have reached a different conclusion. Finally, the decision of the court to acknowledge the right of access as both a treaty and customary right raises a question as to why the court did not concomitantly consider whether the duty to enforce the UN's immunity was also a customary international law obligation.<sup>55</sup>

51. *Id.*

52. *Id.* ¶ 5.1 ("For because the question whether the Mothers of Srebrenica fall under Netherlands jurisdiction within the meaning of article 1 ECHR, or reside within Netherlands territory or are subject to Netherlands jurisdiction within the meaning of article 2 ICCPR cannot unequivocally be answered in the affirmative, the Court of Appeal finds that the right to a fair trial and the right of access to a court of law it entails is a matter of customary law, which can be invoked independently of the preceding provisions.")

53. *Id.* ¶ 5.5.

54. *Id.* ¶ 5.2.

55. *Contra Question of Privileges and Immunities of the United Nations, of Representative Member States and Officials of the Organization*, 1967 U.N. JURID. Y.B. 311, 314, U.N. Doc. ST/LEG/SER.C/5, available at [http://untreaty.un.org/cod/UNJuridicalYearbook/html/volumes/1967/dtSearch/Search\\_Forms/dtSearch.html](http://untreaty.un.org/cod/UNJuridicalYearbook/html/volumes/1967/dtSearch/Search_Forms/dtSearch.html) (asserting that the terms of the General Convention had become part of the customary law governing the relations between the United Nations and member states);

Interestingly, the Dutch Court of Appeals never made an affirmative finding that Article 6 was engaged, but instead merely assumed that the case fell within the remit of the ECHR.<sup>56</sup> Arguably, because the ECHR obliges States only to extend ECHR protections to everyone “within their jurisdiction,” granting immunity to an international organization removes the acts of that organization from the scope of national jurisdiction and, therefore, removes the UN from the subject matter jurisdiction, or *ratione materiae*, of the European Convention.

The English courts have followed this “no-conflict” approach of denying the relevance of Article 6 to international immunities. This reasoning was followed with respect to organizational immunities in 2008 by Justice Tomlinson, who denied the necessity of considering the relationship between UNESCO’s immunity and Article 6 of the ECHR as the United Kingdom “possessed no jurisdiction over UNESCO unless UNESCO chose to waive its immunity” when the United Kingdom became party to the ECHR.<sup>57</sup> It is regrettable that the Dutch Court of Appeals did not choose to engage in a meaningful, judicial dialogue and address this jurisdictional concern.<sup>58</sup>

After determining that the right of access to a court applied to the case under Article 6 of the ECHR, the Dutch Court of Appeals considered whether the grant of immunity to the UN reflected an appropriate restriction of that right. The court applied the criteria developed by the European Court of Human Rights (“European Court”) in *Beer and Reagan v. Germany* and *Waite and Kennedy* as to when immunity may be set

Walter Gary Sharp, Sr. *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT’L LAW 93, 128 (1996) (arguing that the provisions of the General Convention “have reached such universal acceptance that they are now considered customary international law.”); NATIONAL COURTS, *supra* note 32, at 167; HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 1007 (3d rev. ed. 1995); C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 400 (1996).

56. Hof’s-Gravenhage [Court of Appeals] 30 mart 2010 (Ass’n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶¶ 5.2–5.5 (Neth.), available at [http://www.hagueju-ticeportal.net/Docs/Dutch%20cases/Appels\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.hagueju-ticeportal.net/Docs/Dutch%20cases/Appels_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

57. *Entico Corporation Limited, Claimant, against the Secretary of State for Foreign and Commonwealth Affairs, Intervenor, and the United Nations Educational, Scientific and Cultural Organization (UNESCO), Defendant, Decision of 28 March 2008*, 2008 U.N. JURID. Y.B. 477, 487 [hereinafter *UNESCO*], available at <http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByVolume/2008/chpVIII.pdf>.

58. MATTHIAS KLOTH, IMMUNITIES AND THE RIGHT OF ACCESS TO COURT UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28–30 (2010) (suggesting that the approach of the English Courts is flawed because national courts have jurisdictions until it is affirmatively removed by the grant of immunity).

aside.<sup>59</sup> According to the European Court, the right of access is not absolute and national authorities may impose limits on the right that (1) do not inhibit its “essence,” (2) serve a legitimate goal, and (3) are “proportionate to the goal pursued” by the state or international organization.<sup>60</sup>

Here again we see the practice of the English courts diverging from that of the Dutch courts. The Dutch Court of Appeals quickly disposed of the legitimacy requirement by concluding that immunity had been granted for the purpose of promoting the effective operation of the UN.<sup>61</sup> In the *UNESCO* case, Justice Tomlinson found that the appropriate question to ask with respect to the legitimacy of the immunity of a UN subsidy was whether the grant pursued the aim of “compliance with obligations owed in international law.”<sup>62</sup>

This Article contends that the Dutch Court of Appeals has adopted the better position. Justice Tomlinson’s judgment implies that grants of immunity more expansive than those required by international law are illegitimate *per se*. But it is not unimaginable that a state would choose to grant an international organization more expansive immunity than that demanded by international law, as embodied in an organization’s charter, any treaties to which the state is a party, or custom. In the absence of a general rule of international law to the effect that only the narrowest possible immunities are to be granted, the “purpose” test is arguably superior because it affords governments the flexibility to go beyond international law in their relationships with international organizations without reducing the legitimacy inquiry to a mere cypher. Such argument assumes that the test is applied robustly by the domestic courts of the immunity-granting state.

The Dutch Court of Appeals assessed the proportionality of the Netherland’s restriction on the right of access, taking into account the “special position” of the UN as the only international organization

59. Hof’s-Gravenhage [Court of Appeals] 30 mart 2010, *Mothers of Srebrenica*, ¶ 5.12 (citing *Beer & Regan v. Germany*, App. No. 28934/95, Eur. Ct. H.R. (1999); *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R. (1999)).

60. *Waite & Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R. (1999); Hof’s-Gravenhage [Court of Appeals] 30 mart 2010, *Mothers of Srebrenica*, ¶ 5.12. The question of whether the plaintiffs had recourse to alternative fora was an “important aspect” of the proportionality inquiry but would not be determinative. *Id.* ¶ 5.2.

61. *Id.* ¶ 5.6.

62. *UNESCO*, *supra* note 57 (citing *Al-Adsani v. United Kingdom*, 34 Eur. H.R. Rep. 273 (2001); *Fogarty v. United Kingdom*, 34 Eur. H.R. Rep. 302 (2001); *McElhinney v. Ireland*, 34 Eur. H.R. Rep. 323 (2001)).



authorized to use force to preserve international peace. According to the Court of Appeals:

In connection with these extensive powers, which may involve the UN and the troops made available to them in conflict situations more often than not entailing conflicting interests of several parties, there is a real risk that if the UN did not enjoy, or only partially enjoyed immunity from prosecution, the UN would be exposed to claims by parties to the conflict and summoned before national courts of law of the country in which the conflict takes place. In view of the sensitivity of the conflicts in which the UN may be involved this might include situations in which the UN is summoned for the sole reason of obstructing any action undertaken by the Security Council, or even preventing it altogether. It is not inconceivable, either, that the UN is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the UN therefore is closely connected to the public interest pertaining to keeping peace and safety in the world.<sup>63</sup>

Neither the plaintiffs' allegations that the UN had failed to do enough to prevent the Srebrenica genocide, nor the fact that the UN had failed to

63. Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Ass'n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶ 5.7 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version). Many commentators feel that the negative consequences and risk of exposure to biased courts or politicized proceedings has been vastly overstated. See Gaillard & Pingel-Lenuzza, *supra* note 33, at 5–8; Paust, *supra* note 33, at 10; Julia Werzer, *The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administrations in Kosovo and East Timor*, 77 NORDIC J. INT'L LAW, 105, 140 (2008) (“Even if one accepts the argument that there are several reasons against subjecting UN organs and personnel operating on the basis of a Chapter VII mandate to local courts, the UN is under the obligation to respect and protect international human rights. In case the human right of access to a court is restricted, the availability of effective alternative legal remedies has to be ensured.”); Elizabeth Abraham, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in Its Mission in Kosovo*, 52 AM. U.L. REV. 1291, 1334 (2003) (“[I]f the [Secretary-General] feared the lack of independence from a local judiciary, even with international judges, the U.N. should have provided for the hybridization of authority rather than complete usurpation of judicial involvement.”); A.S. MULLER, INTERNATIONAL ORGANISATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP 271 (1997).

Other scholars rely on the same concerns cited by the Dutch Court of Appeals to maintain the legitimacy of the UN's immunity. Robert, *supra* note 1, at 1460; Charles H. Brower, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 92 (2000) (“[N]ational prejudices still threaten the work of international organizations. These prejudices justify the continued existence of international immunities and the maintenance of decision-making authority at the international level.”); Rawski, *supra* note 46, at 129.

establish an alternative forum where the claimants could have their case against the UN heard were sufficiently “compelling” to justify a finding that the grant of immunity was disproportionate to its objectives.<sup>64</sup> With respect to the first of these claims, the Dutch Court of Appeals observed that the UN had neither committed nor assisted in the commission of the Srebrenica genocide.<sup>65</sup> Moreover, although the accusations that the UN had failed to prevent the genocide were “serious,” setting aside the immunity on the grounds suggested by the plaintiffs might “be latched onto too easily [by other courts], which could lead to misuse.”<sup>66</sup>

Guido den Dekker and Jessica Schechinger, academics who researched the case, have called attention to the insinuation that the Dutch Court of Appeals might have withdrawn the UN's immunity had the organization been accused of the “more serious” crimes of committing or assisting in the commission of genocide, as opposed to the “lesser” wrong of failing to prevent the Srebrenica massacre.<sup>67</sup> Although the Court of Appeals did not explain its reason for drawing this distinction, the disparity can perhaps be justified on the basis of the *jus cogens* nature of the prohibitions of genocide versus the treaty-norm status of the latter affirmative duties.<sup>68</sup> Thus, the Dutch Court of Appeals has distinguished itself as the only national court to ever suggest that the “absolute” immunity of the UN might be curtailed on grounds other than a conflict with a constitutional right.<sup>69</sup>

64. Hof's-Gravenhage [Court of Appeals], *Mothers of Srebrenica*, ¶ 5.7; see also Cumaraswamy, *supra* note 29, ¶ 61 (showing the ICJ indicated that States could disagree for the “most compelling reasons with the Secretary-General's decision to not waive immunity”).

65. Hof's-Gravenhage [Court of Appeals], *Mothers of Srebrenica*, ¶ 5.10.

66. *Id.*

67. See also *id.*; Dekker, *supra* note 29, at 6–7. They have also identified a confusing aspect of this ruling, namely that because “the general interest connected with UN immunity . . . and the risk of abuse of domestic court proceedings would not change [even if the UN had been accused of the ‘more serious’ offenses], making it unlikely that the test of proportionality would result in a different outcome.” *Id.* at 6.

68. For more on the nature of the prohibition of genocide as a *jus cogens* norm, see Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 EUR. J. INT'L L. 695, 697, 702 (2007), and Stephen J. Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?*, 46 MCGILL L.J. 187 (2000).

69. American courts have occasionally demonstrated an awareness that the grant of immunity to international organizations may conflict with constitutional law demands that the state provide a forum for the settlement of disputes. *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985); *People v. Mark S. Weiner*, 378 N.Y.S.2d 966 (N.Y. Crim. Ct. 1976). However, “in the near-totality of cases national courts scrupulously stick to the UN's immunity.” Jan Wouters & Pierre Schmitt, *Challenging Acts of Other United Nations' Organs, Subsidiary Organs and Officials* 8 (Leuven Centre for Global Governance Studies, Working Paper No. 49, 2010), available at [http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new\\_series/wp49.pdf](http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp49.pdf).

Finally, the Dutch Court of Appeals examined whether the UN's failure to constitute an alternative forum through which the plaintiffs could seek redress could compel the Dutch courts to revoke the organization's immunity.<sup>70</sup> Whereas the District Court had declined to consider this claim at all,<sup>71</sup> the Court of Appeals subsumed this question into its analysis of the right of access. The Court of Appeals conceded that the UN had failed to establish an adjudicatory mechanism capable of compensating the plaintiffs, and that the status-of-forces agreement negotiated between the Netherlands and the UN provided no means by which to hold the organization accountable;<sup>72</sup> however, the court concluded that the right of access to a court had not been impaired because alternative forums existed where the appellants could hold "two categories of parties liable for the damages incurred by the Mothers of Srebrenica, namely the perpetrators of the genocide and the State."<sup>73</sup> With respect to the claims against the Netherlands, which the Association had reproached "for the same things as the UN," Dutch courts would give a "substantive assessment of the claim" even if the State sought to avoid responsibility by arguing that the actions of Dutchbat soldiers were attributable to the UN.<sup>74</sup>

This aspect of the Dutch Court of Appeals decision is problematic to the extent that it equates the claim lodged against the Dutch state with that of the claim lodged against the UN. An allocation of liability between co-defendants must be fair *from the perspective of the injured party*, and by excluding the UN from the class of defendants against whom the applications could seek compensation, the Court of Appeals failed to

70. Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Ass'n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶ 5.11 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

71. *Id.* ¶ 5.14.

72. The UN and Bosnia and Herzegovina agreed in May 1993 that "any dispute or claim of a private law character to which UNPROFOR or any member thereof is a party and over which the courts of Bosnia and Herzegovina do not have jurisdiction . . . shall be settled by a standing claims commission to be established for that purpose." Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina, U.N.-Bosn. & Herz., art. 48, May 15, 1993, 1722 U.N.T.S. 78, available at [http://untreaty.un.org/unts/60001\\_120000/29/16/00056765.pdf](http://untreaty.un.org/unts/60001_120000/29/16/00056765.pdf). No such commission was ever formed. M.R. GERRITSEN ET AL., VAN DIEPEN VAN DER KROEF ADVOCATEN, PLEADINGS AGAINST UN IMMUNITY, ¶ 57 (June 18, 2008), available at <http://www.vandiepen.com>.

73. Hof's-Gravenhage [Court of Appeals], Mothers of Srebrenica, ¶ 5.13; see also Dekker, *supra* note 29, at 7–8 ("[W]ith respect to the responsible political and military leaders of the Bosnian-Serb army, which the Court of Appeal apparently has in mind . . . this argument seems a bit far-fetched, because . . . a civil claim against an individual soldier of the Bosnian-Serb Army . . . would (in principle) be passed on to the State of Bosnia-Herzegovina.")

74. Hof's-Gravenhage [Court of Appeals], Mothers of Srebrenica, ¶ 5.12.

respect the right of the injured party to have its damages completely redressed.

In the case of multilateral peace operations, illegal conduct will occur as a result of a series of individual decisions and discrete acts by multiple defendants. A different Dutch appellate court implicitly acknowledged this in a decision involving facts similar to those at issue in *Mothers of Srebrenica*:

The question whether the State had 'effective control' over the conduct of Dutchbat . . . must be answered in view of the circumstances of the case. This does not only imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, *issued by the UN or the State*, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned.

When applying the 'effective control' criterion it is important to establish that it is not disputed that the state that provides the troops keeps control over the personnel matters of the assigned soldiers, who are and will remain employed by the state, as well as the power to take disciplinary action and start criminal proceedings against these soldiers. It is not disputed either that the state that provides the troops at all times preserves the power to withdraw the troops and to discontinue their participation in the mission.<sup>75</sup>

Although some actions may be attributable to two or more entities with "effective control" over the impugned conduct, others will only be able to be attributed to a single actor, with the consequence that the plaintiffs may remain uncompensated for some specific wrongful acts if a party were excluded from the litigation.

Moreover, the court neglected to take into account that the conduct of individual co-defendants has to be evaluated in light of the legal obligations imposed on each. Dutch law, for example, provides for liability for the acts of Dutchbat troops under Bosnian law,<sup>76</sup> whereas the

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75. Hof's-Gravenhage [Court of Appeals] 5 juli 2011, NJF 2011, (H.N./Netherlands) ¶¶ 5.8–5.9 (Neth.) (emphasis added), *available at* <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR538> (translating the case in an unofficial English version). The appellate court went on to examine specific decisions and instructions of the Dutch government that gave rise to its liability. *Id.* ¶¶ 5.17–5.19. For more on dual or multiple attribution of responsibility for conduct, see Rep. of the Int'l Law Comm'n, 56th Sess., May 3–June 4, July 4–Aug. 6, 2004, U.N. Doc. No. A/59/10; GAOR, 59th Sess., Supp. No. 10 at 101 (2004).

76. Hof's-Gravenhage [Court of Appelas], H.N., ¶ 6.3. The court also tested the impugned

conduct of the UN forces in Bosnia may be reviewable on the basis of customary international law and the UN-Bosnia and Herzegovina Status of Forces Agreement.<sup>77</sup> In practical terms, this means that even where responsibility for a specific act or decision can be attributed to multiple co-defendants as a matter of fact, whether liability attaches to a particular defendant for a specific act will depend on the scope of the law to which each defendant is bound.

The Dutch Court of Appeals made a critical error in failing to recognize the importance of the UN as a party to the lawsuit, whose presence is essential to ensuring that the plaintiffs might have their damages redressed completely. While this equitable concern may not have been sufficiently compelling to justify withdrawing the grant of immunity, the Court of Appeals should have engaged in a more robust and satisfying balancing of these factors as part of its proportionality analysis.<sup>78</sup>

#### IV. CONCLUDING REMARKS

It is inevitable that, in the course of peace support operations, UN forces will injure civilians and damage their property. Despite this, there have been few cases in which individuals have attempted to bring suit against the UN, alleging its responsibility for wrongful conduct. In the only other known instance, which occurred over forty years ago, the Belgian Civil Tribunal was asked in *Manderlier* to set aside the immunity of the UN and hold it accountable for violations of customary international law.<sup>79</sup> In the course of deciding the claims, the Belgian court rejected the

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conduct against Articles 2 and 3 of the ECHR and Articles 6 and 7 of the ICCPR, insofar as these principles “belong to the most fundamental legal principles of civilized nations” and, in the case of the ICCPR, are binding on the Netherlands through the Bosnian Constitution. *Id.* Interestingly, while the Netherlands in *H.N.* had argued that the ECHR and ICCPR were “not applicable,” the Court assumed that “the State did not mean to assert that it does not need to comply with the standards that are laid down in art. 2 and 3 ECHR and art. 6 and 7 ICCPR in peacekeeping missions . . . .” *Id.* ¶ 6.3.

77. Agreement on the Status of the United Nations Protection Force in Bosnia and Herzegovina, May 15, 1993, 1722 U.N.T.S. 77.

78. The Court of Appeals may have also inadvertently exposed the Dutch state to liability before the ECHR for unduly interfering with the Association’s liberty to decide *how* to bring its case. See Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 137–38 (2005) (discussing *Philis v. Greece*, App. No. 12750/87, Eur. Ct. H.R. 13 Eur. H.R. Rep. 741, (1991)); Dekker, *supra* note 29, at 7 (questioning whether the potential alternative remedies identified by the Court are real); Spijkers, *supra* note 35, at 218–19.

79. In 2000, preliminary steps were taken by two Australian attorneys to sue the UN on behalf of two Rwandan families for the organization’s complicity in the Rwandan genocide. Charges do not appear to have actually been filed, as the UN threatened to invoke its immunity from suit before national courts. Karen MacGregor, *Survivors Sue U.N. for ‘Complicity’ in Rwanda Genocide*, THE

application of Article 10 of the Universal Declaration of Human Rights and ECHR Article 6, holding that the former was a mere “collection of recommendations” lacking legal force, and that the latter was “concluded between fourteen European states only” and could not be imposed on the UN.<sup>80</sup> Compared to *Manderlier*, the Dutch Court of Appeals decision in *Mothers of Srebrenica* is remarkable, inasmuch as the court did not deny the obligatory nature of the right of access. Indeed, the decision is a testament to the newfound willingness of contemporary judges to justify the UN's immunity on the basis of its consistency with other norms of international law. Unfortunately for potential plaintiffs, the Dutch Court of Appeals decision probably also reflects the high-water mark for claims brought against the UN before national courts. The *Mothers of Srebrenica* litigation is a rarity, in that it involves sympathetic plaintiffs with a legitimate legal complaint against the UN who have no other forums in which their claim could otherwise be brought.<sup>81</sup> If a national court is unwilling to set aside the immunity of the UN under such circumstances, it is indeed difficult to imagine a situation in which the right of access *would* be great enough to justify setting aside the grant of immunity.

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INDEPENDENT (Jan. 11, 2000), <http://www.independent.co.uk/news/world/africa/survivors-sue-un-for-complicity-in-rwanda-genocide-727146.html>.

80. *Manderlier v. Organisation des Nations Unies et l'État Belge*, Brussels Civil Tribunal, 11 May 1966, 45 I.L.R. 446, 451–52 (Belg.); Court of Appeals of Brussels, 15 September 1969, 69 I.L.R. 139 (Belg.). See M. R. GERRITSEN ET AL., VAN DIEPEN VAN DER KROEF ADVOCATEN, WRIT OF SUMMONS para. 463 (June 18, 2008), available at <http://www.vandiepen.com/en/srebrenica/detail/79-1%29-writ-of-summons-%284-june-2007%29.html> (“To the extent that the numbers argument in 1966 was valid, that is at present certainly not the case given that now 46 countries have acceded to the EECHR. The second argument, that the EECHR does not apply to the UN, is also incorrect. The EECHR confers on civilians a direct right of access to the court, which means that the court before which a claim is brought must allow access. By so doing it is not imposing the EECHR on the UN, but rather offering protection to the acknowledged—also by the UN—human right of access to the court.”). Reinisch argues that the approach of the Civil Tribunal has “not gained persuasive strength over the years,” but the numbers argument appears to have played a role in the recently decided UNESCO case. *UNESCO*, *supra* note 57, at 484–85 (noting that the obligation to provide for the immunity of UN organs is “owed to virtually the entire international community” and arguing that there is “no room for ‘reading down’ the provisions of the 1947 Convention in order to take account of the provisions of the subsequent ECHR, a treaty which is binding upon only a minority of the parties to the 1947 Convention.”). *Contra* Reinisch & Weber, *supra* note 32, at 77.

81. The Dutch Court of Appeals itself noted in dicta that it “regrets the fact that the UN has not instigated an alternative course of proceedings in conformity with their obligations under Article VIII(29) in the preamble and under (a) of the Convention for claims as this in order to waive the immunity from prosecution.” Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Ass'n of Mothers of Srebrenica/the Netherlands & the United Nations), ¶ 5.14 (Neth.), available at [http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appels\\_Judgment\\_Mothers\\_Srebrenica\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appels_Judgment_Mothers_Srebrenica_EN.pdf) (translating the case in an unofficial English version).

The Mothers of Srebrenica Association has appealed the decision to the Dutch Supreme Court<sup>82</sup> and has expressed their readiness to bring the Netherlands before the European Court if necessary.<sup>83</sup> As a test case for claims against the UN, the ultimate outcome of the case has far reaching implications for peacekeeping operations in the twenty-first century. It is hoped that, as the case works its way through the courts, a persuasive analytical framework for balancing the rights and entitlements at stake capable of withstanding the substantial scrutiny to which it will be subjected will emerge.

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82. See M.R. GERRITSEN ET AL., VAN DIEPEN VAN DER KROEF ADVOCATEN, WRIT OF CASSATION TO THE SUPREME COURT OF THE NETHERLANDS, para. 8.6 (July 1, 2010), available at <http://www.vandiepen.com/en/srebrenica/detail/113-8%29-writ-of-cassation.html> (providing a statement on behalf of Mothers of Srebrenica). The plaintiffs have also requested that the Supreme Court refer the case to the European Court of Justice, arguing that the Court of Justice is the body charged with determining whether a grant of absolute immunity “tallies with the law of the European Community.” *Id.* The same request was made of, and rejected by, the Dutch Court of Appeals. Hof’s-Gravenhage [Court of Appeals], Mothers of Srebrenica, ¶ 5.13.

83. Simon Jennings, *Dutch Court Rules UN Enjoys Absolute Immunity*, IWPR (July 14, 2008), <http://www.groundreport.com/World/Dutch-Court-Rules-UN-Enjoys-Absolute-Immunity/2865032>. It is not clear, however, that plaintiffs fall within the jurisdictional provisions of Article 6 of the ECHR. ECHR, *supra* note 1, art. 6.